

August 14, 2013

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: FairPoint Petition for Waiver of Section 54.313(c) of the Commission's
Rules, filed Feb. 8, 2013 in WC Docket Nos. 10-90 & 05-337

Dear Ms. Dortch:

FairPoint Communications, Inc. ("FairPoint") respectfully requests prompt action on the above-captioned Petition for Waiver of the Commission's rules concerning the use of frozen Phase I Connect America Fund ("CAF") support in 2013 and subsequent years (the "Petition").¹

FairPoint Has Demonstrated Good Cause For Waiver

FairPoint seeks a limited waiver of the requirement under Section 54.313(c) of the Commission's rules that FairPoint, as a price cap carrier, repurpose frozen CAF Phase I support corresponding to FairPoint's former interstate access support ("IAS"), interstate common line support ("ICLS") and local switching support ("LSS"), to build and operate broadband-capable networks in areas substantially unserved by an unsubsidized competitor. FairPoint is unable to comply with the requirement to use at least one-third of frozen IAS, ICLS and LSS in 2013 in areas substantially unserved by an unsubsidized competitor.

Enforcement of the one-third spending requirement for 2013 would divert much-needed funds from FairPoint's existing network operations, and penalize FairPoint customers unnecessarily. As FairPoint has explained in numerous discussions with Commission staff, the obligation requires each individual FairPoint operating company ("carrier") to use at least one-third of its 2013 frozen high-cost support, approximately \$13,088,956 in total,² to build and

¹ See Public Notice, *Wireline Competition Bureau Seeks Comment on FairPoint Communications, Inc. Petition for Waiver of Certain High-Cost Universal Service Rules*, DA 13-213 (rel. Feb. 14, 2013).

² The total frozen high-cost support received by FairPoint in 2013 is expected to be \$39,266,868 (following the sale of Fremont Telcom in January 2013). Petition at 3 & n. 3. One-third of FairPoint's total frozen high-cost support is thus expected to be \$13,088,956. The amount for which the waiver is sought (equal to the amount of Interstate Common Line Support ("ICLS"), Interstate Access Support ("IAS"), and Local Switching Support ("LSS") that

operate broadband-capable networks in areas substantially unserved by an unsubsidized competitor. For some FairPoint carriers, this is impossible due to the presence of unsubsidized competitors who offer some form of broadband according to the National Broadband Map. Though not typically an adequate substitute for voice-grade telephone service, such putative competitors effectively may disqualify entire study areas from Phase I CAF support.³ FairPoint has advocated waiver of the rule because enforcement of the rule as written would be contrary to the Commission's goal of expanding universal voice and broadband availability. Moreover, enforcement of the rule as written would work an undue hardship on FairPoint because of the proportion of its revenues attributable to LSS, ICLS and IAS.⁴ Good cause exists for a waiver.

FairPoint's Request For Relief Was Timely Filed and Narrowly Tailored

FairPoint filed a petition in early February urgently requesting a waiver of the requirement to target frozen IAS, ICLS and LSS to areas "substantially unserved by an unsubsidized competitor," to minimize unnecessary burdens on the company and maximize broadband availability in the FairPoint study areas. FairPoint requested that frozen IAS, ICLS and LSS be excluded from the CAF Phase I one-third spending obligation under Section 54.313(c) of the Commission's rules for 2013 (and higher obligations for later years, if applicable).⁵ Alternatively, FairPoint would be able to certify compliance with the one-third spending requirement in 2013 if FairPoint were permitted to satisfy the requirement at the holding company level – in other words, if FairPoint were permitted flexibility to use the frozen CAF Phase I support in any of the service territories of its incumbent local exchange carriers, rather than using specific amounts in specific local exchange territories or study areas.⁶

FairPoint expects to receive) is \$8,925,295 for 2013. Petition at 5 & Letter from Karen Brinkmann, Counsel to FairPoint Communications, Inc., to Marlene Dortch, Secretary, in WC Docket Nos. 10-90 & 05-337, filed April 5, 2013, at note 2.

³ See *USF-ICC Transformation Order*, para. 149 & n. 238 (if a carrier seeks to use frozen support in an area partially served by an unsubsidized competitor, it must certify that at least 50 percent of the locations served using the support are in census blocks shown on the National Broadband Map as unserved by an unsubsidized competitor).

⁴ Petition at 8-9. As the Commission has acknowledged, FairPoint's status under the Transformation Order is unique among price cap companies. Petition at 5-6, citing *USF-ICC Transformation Order*, 26 FCC Rcd 17663, para. 129 (2011).

⁵ Petition at 1-2.

⁶ As far back as January, FairPoint and other price cap carriers have advocated that they be permitted to certify compliance with the rule at the holding company level rather than at the operating company or study area level, as an alternative to the relief requested in FairPoint's waiver petition, in the event that the one-third spending obligation is not otherwise waived. See,

The Waiver Request Is Ripe For Action

The Petition has been thoroughly vetted, and action should wait no longer. Due to the urgency of the problem, the broadband spending obligations associated with frozen CAF Phase I support for 2013 and later years were raised with the Wireline Competition Bureau as early as Autumn 2012, and FairPoint and others in the industry have been in close communication with the Bureau concerning this matter for the past *nine months*. FairPoint and other carriers also have briefed the Commissioners' legal advisors on the matter. Specifically:

- A group of carriers that included FairPoint met with the Bureau on December 17, 2012 to discuss the difficulty of compliance with Section 54.313(c) as written.⁷ At least one carrier raised the issue as early as November 15, 2012.⁸
- On January 31, 2013, the price cap carriers' trade association filed a letter advocating either relief from the one-third spending obligation for IAS or that price cap carriers be permitted to certify compliance with the obligation at the holding company level.⁹
- On February 8, FairPoint filed the Petition, which appeared on FCC Public Notice on February 14.¹⁰
- On February 25, a group of carriers that included FairPoint again met with the Bureau to discuss the need for relief.¹¹

e.g., Letter from David Cohen, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90, filed Jan. 31, 2013, at 2-3.

⁷ See Letter from Jonathan Banks, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90, filed Dec. 20, 2012 (describing meeting with Bureau staff and representatives of FairPoint, Verizon, Windstream, AT&T and CenturyLink on December 17, 2012).

⁸ See Letter from Karen Brinkmann, Counsel to Alaska Communications Systems Group, Inc., to Marlene Dortch, Secretary, in WC Docket Nos. 03-109, 05-337, 07-135, and 10-90, WT Docket No. 10-208, and GN Docket No. 09-51, filed Nov. 19, 2012 (describing meeting with then-Chairman Genachowski's legal advisor, the future legal advisor of Acting Chairwoman Clyburn, and other Bureau staff, to discuss problems with frozen CAF Phase I compliance).

⁹ Letter from David Cohen, *supra*, note 5.

¹⁰ See *supra*, note 1.

- On March 14, the carriers filed additional data, as requested by the Bureau, documenting the significant financial impact of the rule; the carriers updated that information on March 27 and March 28.¹²
- On April 3, FairPoint met with the Bureau and the Commissioners' legal advisors to request prompt action on the pending Petition and explain the financial impact in the absence of a waiver.¹³
- On April 9, Alaska Communications Systems ("ACS") filed a petition for waiver of Section 54.313(c), and requested relief similar to that sought by FairPoint – flexibility to use the support in any study area within the holding company, and relief from the inclusion of frozen ICLS and LSS in the one-third spending requirement.¹⁴ The ACS Petition went on Public Notice April 11.¹⁵
- On April 10, representatives of FairPoint and other price cap carriers again met with the Bureau to discuss the urgent need for action on the pending waiver petitions.¹⁶

¹¹ See Letter from Jonathan Banks, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90 & CC Docket No. 01-92, filed Feb. 27, 2013.

¹² Letter from Jonathan Banks, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90 & CC Docket No. 01-92, filed March 14, 2013; Letter from Jonathan Banks, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90 & CC Docket No. 01-92, filed March 27, 2013; Letter from Jonathan Banks, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90 & CC Docket No. 01-92, filed March 28, 2013.

¹³ See Letter from Karen Brinkmann, *supra*, note 2 (describing meetings with Angela Kronenberg, Priscilla Argeris, Nick Degani, Wireline Competition Bureau Chief Julie Veach, and a number of Bureau staff).

¹⁴ As an alternative, ACS requested permission to use frozen high-cost support in areas already served by an unsubsidized competitor. Petition of ACS For Flexibility In the Use Of Frozen High-Cost Support, WC Docket No. 10-90 (filed April 9, 2013).

¹⁵ *Wireline Competition Bureau Seeks Comment On the Alaska Communications Systems Petition For Waiver Of Certain High-Cost Universal Service Rules*, Public Notice, WC Docket No. 10-90, DA 13-700 (rel. April 11, 2013).

¹⁶ See Letter from Jonathan Banks, United States Telecom Association, to Marlene Dortch, Secretary, in WC Docket No. 10-90 & CC Docket No. 01-92, filed April 15, 2013.

- In June and July, FairPoint continued to check on the status of the Petition with the Bureau. Following acceptance of the price cap carriers' annual interstate access tariff filings, made in June, effective as of July 1, FairPoint was hopeful that all impediments to action had been removed, and this matter could be resolved.

Relief Should Be Granted Without Further Delay

It is time for action on the FairPoint Petition. The Petition has been pending more than six months, and the issues have been thoroughly discussed with Commission decision-makers. While the certification required for 2013 frozen CAF Phase I support will not come due until July 1, 2014, the obligation to use at least one-third of frozen CAF Phase I support to build and operate broadband-capable networks in areas substantially unserved by an unsubsidized competitor, as provided in Section 54.313(c) of the rules, is in effect *now*, and must be fulfilled before the end of calendar year 2013. Moreover, the obligation will grow more onerous in 2014, applying to two-thirds of frozen CAF Phase I support. FairPoint has demonstrated that compliance with the rule as written not only is impossible but would disserve the public interest. Accordingly, FairPoint respectfully requests that the Petition promptly be granted.

A copy of this letter is being filed in the above-captioned dockets via the Commission's electronic comment filing service, pursuant to Section 1.1206(b)(1) of the Commission's rules. Please direct any questions concerning this matter to me.

Very truly yours,



Karen Brinkmann
*Counsel to FairPoint Communications,
Inc.*

cc: Priscilla Argeris
Nick Degani
Rebekah Goodheart
Carol Matthey
Deena Shetler
Julie Veach